No. 14,563

IN THE

United States Court of Appeals

For the Ninth Circuit

WONG BING NUNG,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

LLOYD H. BURKE,
United States Attorney,
JOHN H. RIORDAN, JR.,
Assistant United States Attorney,
422 Post Office Building,
Seventh and Mission Streets,
San Francisco 1, California,
Attorneys for Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO.

Subject Index

Table of Authorities Cited

Cases

Other Authorities

Statutes

No. 14,563

IN THE

United States Court of Appeals

For the Ninth Circuit

WONG BING NUNG,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of conviction of the United States District Court for the Northern District of California, convicting the appellant, after trial by Court, of violation of the smuggling statute (18 U.S.C. 545).

The jurisdiction of this Honorable Court is properly invoked under the provisions of 28 U.S.C.A., Sections 1291 and 1294.

STATEMENT OF THE CASE.

Title 18 U.S.C.A., Section 545 provides:

"Whoever knowingly and wilfully with intent to defraud the United States smuggles or clandes-

tinely introduces in the United States any merchandise which should have been invoiced * * * shall be fined not more than $5,000 or imprisoned not more than two years or both."

The indictment charges:

"That Wong Bing Nung on or about the 15th day of December, 1953, at the City and County of San Francisco, State and Northern District of California, did knowingly and wilfully, with intent to defraud the United States, smuggle and clandestinely introduce into the United States, merchandise which should have been invoiced, to-wit, 6 boxes containing an assortment of pills, capsules, syrups, powders, cigarettes, ointments, poultices, oils and foodstuffs."

Appellant waived a jury trial (Vol. I, Tr. 5) and, after trial by Court in this matter, he was adjudged guilty of the charge contained in the indictment. The trial judge imposed a 1 year suspended sentence and a fine of $250, and placed appellant on probation for a period of 2 years.

Appellant stated in his opening brief that the "facts are simple" and, correctly so, because he has stipulated to almost the government's entire case (Tr. 6, 10, 11, 13 and 48).[1]

At the time of the crime set forth in the indictment appellant was a member of the crew of the S.S. PRESIDENT CLEVELAND and was such a crew

[1]All references hereafter to testimony and exhibits are found in Volume II of the Reporter's Transcript and designated by the letters "Tr."

member of said vessel for a period of two years prior thereto (Tr. 79). On December 15, 1953, the PRESIDENT CLEVELAND docked in San Francisco, having completed a voyage from Hong Kong (U.S. Exhibit No. 6 Ship's Manifest, Tr. 45).

Pursuant to Customs regulations, every crew member is required to submit a declaration of all goods and merchandise purchased by him in a foreign country. In accordance with such regulations, appellant submitted such a declaration (U.S. Ex. 7, Tr. 45 and 48).

Appellant's only witness, Dong Dock Leong, testified that he wrote the declaration for appellant at appellant's request (Tr. 73). Appellant signed the declaration (Tr. 80). Appellant told the witness Dong exactly what to declare (Tr. 81, 87). In fact, the witness asked appellant if he had anything additional to declare, and appellant said no (Tr. 87). This witness testified that none of the merchandise seized was ever declared (Tr. 86).

For the purpose of appraising the declared merchandise, Customs Inspector Forsyth testified about questioning appellant on December 15, 1953 in connection with his declaration, and appellant steadfastly denied that he had no other imported merchandise to declare (Tr. 57, 58).

Dong, appellant's only witness, further testified that on December 16, 1953, at about 6:30 P.M., appellant requested him to contact Customs Inspector Marshall and ascertain if appellant could remove or unload certain undeclared merchandise (U.S. Ex.

No. 1) off the ship and through the Customs line (Tr. 76, 77).

On December 16, 1953, the day after the ship docked, between 9 and 10 P.M. the Customs Inspectors seized six cartons or boxes weighing between 500 and 600 pounds (Tr. 6) containing the merchandise set forth in the indictment (U.S. Exs. 1, 3; Tr. 11, 12). This merchandise was seized on the vessel in the appellant's room, two boxes in an adjoining room. After the seizure appellant was questioned by Customs Agent Kahler and appellant denied that he was the owner of the seized merchandise (Tr. 88). However, it was stipulated in the trial that appellant was in fact the owner (Tr. 11) and that said merchandise was not declared (Tr. 48).

The merchandise that appellant did declare in United States Exhibit 7 was found after the seizure in appellant's automobile which was parked at the dock near the ship. This declared merchandise was similar to the undeclared merchandise seized on the ship (Tr. 40, 60, 61).

A day after above seizure the Customs Agents found in appellant's automobile several sheets of paper (U.S. Ex. 3; Tr. 25, 53) containing Chinese writing or characters. These documents were described by a witness as constituting an invoice of various medicinal preparations, together with the price, amount, quantity and the names of various business establishments. These business establishments are all located in San Francisco (Tr. 21, 22). The witness further testified that about 50% of the items men-

tioned in the invoice were contained in the seized merchandise (Tr. 25). At the same time the Agents also found in appellant's automobile two brown note books (U.S. Exs. 4, 5; Tr. 29, 31, 54). The witness described United States Exhibit 4 as containing a price list of various articles and that some of the articles therein mentioned are the same as those seized (U.S. Ex. 1; Tr. 30).

United States Exhibit 5 was described as containing a list of articles, their unit price and the total value. There is also testimony that some of the articles listed in this exhibit are also included in the seizure (U.S. Ex. 1; Tr. 31).

ARGUMENT.

I. APPELLANT INTENDED TO DEFRAUD THE UNITED STATES IN THAT HE FAILED TO MAKE A FULL AND COMPLETE CUSTOMS DECLARATION AND BY CLANDESTINELY BRINGING IMPORTED MERCHANDISE INTO THE COUNTRY.

The appellant's first contention is that he never intended to bring the merchandise into the United States. The authorities hold that goods are imported or brought into the United States when they enter the waters of the United States. In *Tomplain v. United States,* 42 F. 2d 203, certiorari denied 282 U.S. 886, the Court said on page 205:

> "* * * the offense of unlawful importation was complete, in the absence of a bona fide intent to make entry and pay duties, when the prohibited merchandise entered the waters of the United States, although not actually landed on shore."

The Court further stated on page 204:

> "Entry through a custom house is not of the essence of the act."

The doctrine expressed in *United States v. Keck* and *United States v. Ritterman,* cited in appellant's brief, were distinguished in the *Tomplain* case.

The Supreme Court held in *United States v. Keck,* 172 U.S. 434, that the crime of smuggling is completed when the obligation to pay duty arose. Under the circumstances presented by the record on this appeal, the obligation to pay customs duty arose when appellant filed his declaration (U.S. Ex. 7). Appellant, therefore, defrauded the government when he failed to make a full and complete disclosure in his declaration. At the bottom of U. S. Exhibit 7 appears the following language:

> "I declare that the above statement, is a just, true, and complete account of all articles brought into the United States by me which have been acquired abroad."

There is an abundance of evidence to support the finding of the above appellant's felonious intentions to bring the merchandise into the United States. The record shows that he filed a declaration containing merchandise identical with that seized by the customs officials which was not declared. His friend, Dong, asked the appellant if he made a complete declaration (Tr. 87). Subsequently, even the customs officials presented him with another opportunity to make a complete disclosure (Tr. 57, 58). The record shows that appellant never intended to declare the

merchandise set forth in the indictment because when it was seized, he denied the ownership thereof (Tr. 88). The record indicates that the motive for appellant's clandestine introduction of the goods into the United States was for sale and delivery to stores in the San Francisco area and thus defraud the government of customs duty. This is indicated by the Chinese invoices and documents found in his automobile.

II. APPELLANT FAILED TO EXPLAIN HIS POSSESSION OF THE MERCHANDISE SET FORTH IN THE INDICTMENT.

It was stipulated at the trial that appellant was in fact the owner (Tr. 11) and that the said merchandise was not declared (Tr. 48). In view of this we encompass the rule of law which states that possession of goods on which customs duty was not paid is sufficient to authorize a conviction for violating customs laws; unless the defendant can explain the possession to the jury's satisfaction.

> Title 18 *United States Code,* Section 545:
>
> "Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section."
>
> *Tomplain v. United States,* 282 U.S. 886;
>
> *Hounes v. United States,* 268 U.S. 695;
>
> *United States v. Stein,* 53 F. Supp. 911.

Appellant never took the stand to explain his admitted possession. As stated by his attorney (Tr. 72):

> "Mr. Ringole. I have decided, in view of this testimony, that it won't be necessary to put the defendant on the stand, won't, can't help anything in the case."

Appellant's counsel, in his brief, makes the contention, which is not supported by the record, that it was not the defendant's intention to defraud the United States by smuggling or clandestinely introducing the merchandise into the United States but, on the other hand, it was the defendant's intention that if he could not move the merchandise through Customs without a declaration, he was going to return the same to Manila. The defendant did not at any time inform the Customs officials that this was his intention (Tr. 71). In fact, the only statements made by the appellant to the Customs officials were to the effect that the merchandise (U.S. Ex. 1) did not belong to him (Tr. 88), and it was not until the time of trial that ownership of the merchandise was admitted by him.

III. THE EVIDENCE SUPPORTS THE FINDINGS AND JUDGMENT MADE BY THE TRIAL JUDGE.

Findings by the trial Court have the force and effect of a verdict and are governed by the same principles concerning appellate review. So, where the case is tried by the Court, the rules as to review are the same as though there had been a jury verdict. *Furrow v. United States,* 46 F. 2d 647; 24 *C.J.S.,* page 806.

It is the accepted rule that the verdict of the jury must be sustained if there is substantial evidence,

taking the view most favorable to the government to support it. *Glasser v. United States,* 315 U.S. 60, 80. In *Craig v. United States,* 81 F. 2d 816, 827, certiorari denied, 298 U.S. 637, this Honorable Court said:

> "* * * To sustain a conviction, we need not be convinced *beyond reasonable doubt* that the defendant is guilty: It is sufficient if there is in the record substantial evidence to sustain the verdict.
>
> In *Felder v. United States* (C.C.A. 2), 9 F.2d 872, 875, certiorari denied, 270 U.S. 648, 46 S.Ct. 348, 70 L.Ed. 779, the court said:
>
> > 'That we cannot investigate it (the testimony) to pass on the weight of the evidence is a point too often decided to need citation; nor can we, after investigation, use such doubts as may assail us to disturb the verdict of the jury. *That reasonable doubt which often prevents conviction must be the jury's doubt, and not that of any court, either original or appellate.* (Cases cited.) Our duty is but to declare whether the jury had the right to pass on what evidence there was.' (Italics our own.)
>
> The correct rule was thus tersely phrased in *Humes v. United States,* 170 U.S. 210, 212, 213, 18 S.Ct. 602, 603, 42 L. Ed. 1011:
>
> > 'The alleged fact that the verdict was against the weight of evidence we are precluded from considering, if there was any evidence proper to go to the jury in support of the verdict. (Cases cited.)'
>
> See, also, 17 C.J. 264-269."

At the conclusion of the trial appellant made a motion for judgment of acquittal. In denying this motion, the trial judge filed a written memorandum (Vol. I, Tr. 8) wherein he stated:

> "The Court finds that defendant owned the property specified in the Indictment; that he retained possession of such property on board the SS President Cleveland when it docked in San Francisco, that he failed to list such property on the ship's manifest, that he failed to declare such property in his customs declaration, that he intended to defraud the government of the United States by moving the property into this country without the payment of customs duties as required by law, that he sought through an intermediary to move the property by clandestine means into the United States, that his intent and conduct constituted a violation of 18 U.S.C.A. 545."

CONCLUSION.

Appellant's brief concludes in a theme of alleged racial discrimination wherein he states "I haven't a Chinaman's chance." Nowhere does he substantiate this by reference to the record because the trial and judgment are absolutely void of any such suggestion. Note that after conviction the Honorable trial judge did not sentence the appellant to imprisonment but was magnanimous enough to grant appellant probation and a small fine of $250 (Vol. I, Tr. 17). Where in the said judgment can the appellant claim prejudicial misconduct? The record further shows that the appellant availed himself of the prerogative not

to take the witness stand in his own defense. Thus, there is no evidence or explanation in defense of his clandestine activities.

In the light of the foregoing, and on a record free from error, appellee respectfully urges this Honorable Court to sustain the judgment of the trial judge. This judgment was clearly supported by substantial evidence, and the trial was conducted in conformity with the highest traditions of our federal judicial system, during all stages of the proceedings, and appellant was accorded every right to which he was entitled, while at the same time the trial judge safeguarded all of the rights of the appellee herein, United States of America, in the exercise of its sovereignty.

It is, therefore, respectfully submitted that the appellant's conviction should be affirmed.

Dated, San Francisco, California,
December 29, 1954.

LLOYD H. BURKE,
United States Attorney,
JOHN H. RIORDAN, JR.,
Assistant United States Attorney,
Attorneys for Appellee.